2024-05-29

Westbury 2101 LLC v. Pierre

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART P
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WESTBURY 2101 LLC, INDEX NO. L&T 304182/23

Petitioner, **DECISION/ORDER**

-against-

ANTOINE JEAN PIERRE,

"JOHN DOE", "JANE DOE",

Respondents.
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HON. MALIKAH SHERMAN, J.H.C.

The Decision/Order after Trial is as follows:

Petitioner filed this holdover petition in January 2023, alleging that Respondent Antoine Jean Pierre was a licensee of the deceased former tenant of record, Antoine Pierre,[1] and that Respondents had failed to vacate the subject premises after service of a ten-day notice to quit. Petitioner further alleges that the subject premises, 2101 Westbury Court, Apt. 4A, Brooklyn, NY 11225, is subject to rent stabilization, but not as to Respondents as licensees. Respondent Antoine Jean Pierre (hereinafter "Respondent") first appeared by counsel on April 24, 2023 and the proceeding was adjourned by stipulation for Respondent to answer the petition. Respondent's answer, served and filed on May 9, 2023, raises various denials and admissions, including Respondent's admission that he is in possession of the rent-stabilized subject premises, and it includes affirmative defenses that he is entitled to succeed to the lease for the subject premises, being the son of the former tenant of record and having co-habited with him for at least nearly

[1] Respondent and the former tenant of record share the same name.

four years before his death in 2022; Petitioner failed to file proof of service of the notice of petition and petition in the timeframe required by law, and still had not done so by the time the answer was filed; the Court lacks personal jurisdiction due to both that omission, and alleged improper service of the notice of petition and petition; service of the notice of petition and petition was not effectuated between ten (10) and seventeen (17) days of the first court appearance; and Petitioner created a tenancy with Respondent by accepting ERAP funds paid on his behalf. The alleged undertenants "John Doe" and "Jane Doe" have not appeared.

Respondent also moved to dismiss the petition on May 9, 2023. By stipulations of the parties, the proceeding and motion were adjourned numerous times between May 11, 2023 and October 10, 2023, for discovery to be voluntarily shared by Respondent and for Petitioner to oppose the motion. The affidavit of service of the notice of petition and petition was eventually filed by Petitioner on May 11, 2023. On October 10, 2023, the Court denied Respondent's motion to dismiss based on the late filing of the affidavit of service of the notice of petition and petition, holding that Respondent had failed to show any prejudice created by that lateness (Hon. Hannah Cohen, J.H.C.). The proceeding was then transferred to the trial part that day.

A pre-trial conference was conducted immediately, and the resulting pre-trial order scheduled the trial for November 16, 2023. Before that date, the trial was adjourned by stipulation of the parties to December 12, 2023. The trial was commenced on December 12, 2023, and then adjourned to December 21, 2024, at which time it concluded. Only one witness testified. On December 21, 2024, the Court made its findings, decision, and order on the record in open court, granting Respondent's oral application to dismiss, and dismissing the proceeding. The Court now makes this written order in accordance with that existing decision and order already held on the record.

Petitioner's witness, Carmella Chapman, testified that she is the office property manager for Petitioner, which is the owner of the subject building. Petitioner's witness further testified that it is a sixty-one unit building registered with the New York State Department of Housing and Community Renewal (DHCR), and that she knows that Antoine Pierre was the tenant of record for the subject premises, apartment 4A. To that end, certified copies of DHCR rent rolls for the subject building, for the years 2020 through 2023, were offered and entered into evidence.[2] Details for the subject premises, including Antoine Pierre as the listed tenant and the rent stabilized status of the apartment, are recorded for the 2021 through 2023 rent rolls. The Court observes that although the 2020 rent roll indicates that it is four pages long, only the first two pages were submitted to the Court, and these two pages do not include any information for the subject premises or Antoine Pierre.

Petitioner's witness further testified that Antoine Pierre died, and she did not believe that anyone was living in the subject premises at the time of her testimony, but that his son was seeking possession. However, she also testified that Mr. Antoine's son did not vacate the subject premises after either service of the ten-day notice to quit or the petition. She explained that she discovered that Mr. Antoine died after his son appeared in a non-payment proceeding in January 2023 and reported that his father had already died. She stated that Petitioner then "stopped" the non-payment proceeding and began the holdover proceeding. At trial, Respondent did not oppose the introduction of a copy of a death certificate for Antoine Pierre into evidence, as Respondent conceded he had died.[3]

Ms. Chapman testified that she has reviewed hundreds of death certificates as part of her job as the property manager, reviewed the death certificate for Antoine Pierre, and hired a private

[2] Petitioner's exhibit 1.
[3] Petitioner's exhibit 3.

investigator, Charles Gordon, to investigate Respondent. She explained that she had no personal knowledge of where Respondent lived, so she relied on the information in the death certificate, and she believed that Respondent was not registered to vote at the subject premises based on her review of voting records.[4] The Court observes that the death certificate in evidence is not wholly legible, and although "Antoine Jean-Pierre Jr.," "son," and an address of "701 Clinton Ave., Newark, NJ 07108" are listed on the death certificate, along with much other information and the names of other individuals aside from the decedent, the small-font sub-headers for the sections containing this information are not legible because the copy is blurred. As a result, aside from the undisputed death of Antoine Pierre,[5] the copy of the death certificate is of limited probative value. An abstract of Respondent's driving record was entered into evidence.[6] The driving record reports an address for Respondent of 1607 Sherwood, Baltimore, MD 21239 and indicates that he does not have a New York license.

Ms. Chapman concluded by testifying that her job responsibilities also include creating new leases and sending leases to tenants; registering apartments with DHCR; working with Section 8, SCRIE, and DRIE programs;[7] and "many things." She explained that she evaluates succession claims by looking at her office's records; looking at a tenant of record's "tenant information sheet" to see if any occupants are listed; and asks the superintendent and managing agent if they know of anyone in the apartment in question. Regarding the subject premises, she explained that she did not believe that Petitioner should grant Respondent succession rights. Petitioner concluded its direct examination of this witness and Respondent did not seek to cross-

[4] Respondent's objection to the offer of Petitioner's exhibit 4 into evidence, which was purportedly a voting record for Respondent, was sustained and the offer was deemed inadmissible into evidence.
[5] The death certificate lists the decedent's name as "Antoine Jean-Pierre."
[6] Petitioner's exhibit 5 (New York State Department of Motor Vehicles Abstract of Driving Record dated November 21, 2023).
[7] The New York City Senior Citizen Rent Increase Exemption and Disability Rent Increase Exemption programs, respectively.

examine her. The proceeding was adjourned to December 21, 2024 for Petitioner to continue presenting its case, as Petitioner represented it intended to call two additional witnesses, including the superintendent for the subject premises.

On December 21, 2024, only counsel for both parties and Respondent were present. After Petitioner's counsel returned to the courtroom late, shortly after the Court had already called the case, the Court cautioned that such lateness could result in a dismissal. Petitioner's counsel first indicated that a dismissal would be desirable, before eventually confirming that Petitioner would not be consenting to a dismissal and would indeed proceed with the trial, after questioning from the Court about these unexpected and surprising remarks. Petitioner's counsel reported that one of its witnesses was not present, but Petitioner wished to call Respondent as a witness. A certified deed for the subject building was entered into evidence, without objection.[8] However, rather than call its next witness, Petitioner then suddenly reversed course, informing the Court that it was not going to call Respondent as a witness after all, and instead rested on its case.

Upon Petitioner resting, Respondent immediately made an oral motion to dismiss, arguing that Petitioner had not elicited any testimony about Respondent's interest in the subject premises, as required by RPAPL § 741; aside from Petitioner's witness stating that no one lived in the subject premises, there was no testimony about Respondent's occupancy status or his possession of the premises, as claimed in the petition; there was no lease for the former tenant of record in evidence; and no proof of alleged use and occupancy due had been presented. Petitioner opposed the motion, arguing that Respondent was claiming possession and control and the witness had testified to this; there was no lease between Petitioner and Respondent to offer because none existed; and "someone" was seeking succession. The Court granted Respondent's

[8] Petitioner's exhibit 6, showing ownership by Petitioner.

motion, as not all elements of Petitioner's *prima facie* case had been demonstrated, explained more fully below.

Petitioner indeed did not demonstrate what Respondent's relationship to the subject premises was, as required by RPAPL § 741. The witness testified that Respondent was seeking possession, which reflected Petitioner's understanding of what Respondent wants, but no testimony was elicited about Petitioner's theory of the case: namely, that Respondent was a licensee of the former tenant of record, that his license expired after that tenant's death, and that he no longer had any right to possession of the subject premises. There was no testimony regarding Respondent's alleged licensee status whatsoever.

The Court also found the witness' statements regarding Respondent's residency to be contradictory. The witness testified that no one was currently living in the apartment, yet also testified that Respondent failed to vacate the apartment after service of the notice to quit and the petition. It was clear from the witness' testimony that she was referring to physical occupancy, not merely legal possession. If no one was living in the apartment at the time of trial, then it cannot also be true that Respondent failed to physically move out from the apartment, regardless of any claim he might retain for legal possession. Contrary to the assertion of Petitioner's attorney, the witness did not allege that Respondent was "in control" of the subject premises, but she stated that he was seeking possession.

Respondent was also correct that Petitioner failed to prove its claim that Antoine Pierre was entitled to possession of the subject premises due to a tenancy, and that tenancy had since terminated due to his death. The death of Antoine Pierre was undisputed and the rent-stabilized status of the subject premises was established, and Petitioner took steps to introduce a purported

former lease for Antoine Pierre into evidence.[9] However, during the direct examination of its witness, after objections from Respondent's counsel related to the offer into evidence, Petitioner suddenly withdrew this offer. No lease was ever offered into evidence again.

For the reasons above, the Court has found that Petitioner has not met its *prima facie* burden of proof. CPLR § 5013 provides that:

> A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

When a proceeding is dismissed with the procedural posture existing in this holdover proceeding, pursuant to CPLR § 5013, the dismissal is presumptively on the merits unless the Court indicates otherwise, and the Court did not indicate otherwise here. Petitioner chose to rest on its case. Because Petitioner did not prove, as a *prima facie* matter, that Respondent is a licensee with a terminated license, a dismissal of this cause of action with prejudice, after the close of its case at trial, is warranted. *See New York City Hous. Auth.-Fulton Houses v. Alicea*, 63 Misc. 3d 502, 97 N.Y.S.3d 389 (N.Y. Civ. Ct. 2019). The Court also takes the following into account: Petitioner elected to call no further witnesses; it elected to rest on its case; it intimated initially that a dismissal might be desirable, before confirming it would proceed; and it voluntarily withdrew an offer of evidence which was material to its own allegations, with no further attempt to reintroduce it. *See Jocar Realty Co. v. Rukavina*, 130 Misc. 2d 1009, 1012, 498 N.Y.S.2d 244, 246 (Civ. Ct. 1985), aff'd, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1987) ("Because petitioner was allowed at trial an opportunity to offer additional proof on this point and chose to stand on the proof already submitted, there appears to be no reason to allow it a 'second bite at the apple.' The dismissal therefore, is with prejudice to the reinstitution of an action for the same

[9] Petitioner's exhibit 2 for identification was identified by the witness as a lease for Antoine Pierre for a term beginning in 2020 and expiring on February 28, 2022.

relief."); *Lyddy v. Ayling*, 111 Misc. 2d 449, 454, 444 N.Y.S.2d 823, 826 (Civ. Ct. 1981) ("The overwhelming majority of cases, on the other hand, recognize that a party normally gets but one trial. So long as the proponent has had a 'full and fair opportunity to either prosecute or defend an action, but has, without mitigating circumstances, failed to do so', the resulting adjudication is 'on the merits,'" citing *Greyhound Lines, Inc. v. Pamtours, Inc.*, N.Y.L.J., February 27, 1978, p. 11, col. 2 (App. Term, 1st Dept.) and cases cited therein).

The Court is cognizant that such a dismissal does not immediately resolve the matter of Respondent's status and relationship to the subject premises. However, the Court also finds that causing Respondent to endure identical eviction-related litigation again, when Petitioner consciously did not take advantage of the opportunities it had at trial to present its case, is also unwarranted. The dismissal does not eliminate the succession rights claim raised by Respondent in his answer, and the Court notes that Housing Court is not the only forum in which Respondent may raise that claim.

Petitioner also elected not to broach the topic of use and occupancy at all during the trial. Although the petition indeed seeks use and occupancy through January 31, 2023, the Court also takes judicial notice that the notice of petition makes no demand for a money judgment, leaving a blank space where such a demand would be.[10] *See also* RPAPL § 741(5). Petitioner had a full and fair opportunity to attempt to make some evidentiary showing for this relief during the trial, but opted not to do so, and the Court finds that Petitioner is not entitled to a second chance to seek use and occupancy through the date of the petition, January 31, 2023.

Lastly, in addition to failing to satisfy its *prima facie* burden of proof, no default judgments against "John Doe" or "Jane Doe" would be warranted in any event as there was no evidence regarding whether Respondents "John Doe" and "Jane Doe" were in the military or

[10] *See* Petition at ¶9 and Notice of Petition at ¶2, at NYSCEF document nos. 1 and 3, respectively.

dependent upon anyone in the military, obtained either as the result of a non-military investigation or some other means. Such evidence would need to be provided to the Court, pursuant to both state and federal law, prior to the entry of a default judgment. *See* NY Mil. Law § 309; *New York City Housing Authority v. Smithson*, 119 Misc.2d 721, 464 N.Y.S.2d 672 (Civ. Ct. N.Y. Co. 1983); *Palisades Acquisition, LLC v. Ibrahim*, 12 Misc.3d 340, 812 N.Y.S.2d 866 (Civ. Ct. N.Y. Co. 2006); *Central Mortg. Co. v. Acevedo*, 34 Misc.3d 213, 934 N.Y.S.2d 285 (Sup. Ct. Kings Co. 2011).

Accordingly, after the testimony and other evidence adduced at trial, and as held on the record in open court on December 21, 2023, it is,

ORDERED that the proceeding is dismissed. The dismissal is with prejudice for the reasons articulated above, and without prejudice to Respondent's defenses, including, but not limited to, his claim of succession rights.

Petitioner is directed to pick up its exhibits within 30 days from the courthouse, or they will either be sent to its attorney or destroyed at the Court's discretion and in compliance with DRP-185.

Copies of this decision and order shall be uploaded to NYSCEF by the Court.

This is the decision and order of the Court.

So ordered,

May 29, 2024

Hon. Malikah Sherman, J.H.C.